Ismail Darmansyah v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–44 OF 2008
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
18 OCTOBER 2010

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found in paper bag carried by appellant — Whether there were serious errors committed in findings of fact by trial judge — Whether trial judge erred by alluding to inferences to establish ingredient of trafficking rather than by alluding to presumption provision — Dangerous Drugs Act 1952 ss 37(d), 37(da) & 39B(1)

Acting on information received, a police party headed by Chief Inspector Fadzir bin Othman ('the CI') had conducted an observation of a restaurant situated in Shah Alam. During that surveillance the CI had spotted Ismail Darmasyah ('the appellant') walking past him carrying a blue paper bag ('the bag') in his right hand. The appellant was detained by members of the police party who had trailed him, in the parking area in front of the restaurant. Thereafter a struggle ensued but the appellant was finally restrained. When the bag that the appellant was carrying was searched it was found to contain two slabs of compressed plant material, which were later confirmed by the chemist to be 1,7236g of cannabis. The appellant was charged with trafficking in 1,7236g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The prosecution relied on the presumption under s 37(d) to prove the required ingredient of possession with knowledge. The trial judge found that the prosecution had successfully established that the appellant had custody or control of the bag which contained the drugs and concluded that the appellant was trafficking cannabis at the relevant time. The trial judge thus convicted the appellant of trafficking and sentenced him to death. This was the appellant's appeal against that conviction and sentence. In his grounds of appeal the appellant submitted that the trial judge had misdirected himself by coming to a finding that the appellant was trafficking based on the presumption of possession and thereafter arriving at an inference that he was trafficking. It was the appellant's contention that as there was no evidence of actual trafficking by way of direct or circumstantial evidence adduced by the prosecution, the trial judge should have invoked s 37(da) of the DDA to establish the ingredient of trafficking. The main issue to be considered in this appeal was whether the trial judge had erred by alluding to inferences to establish the ingredient of trafficking rather than by alluding to a presumption provision.

Held, dismissing the appeal:

(1) As the trial judge had earlier invoked s 37(d) of the DDA to establish

A mens rea of the drugs he was embargoed from invoking any other presumption, he had only the direct evidence option to establish the ingredient of trafficking (see para 12).

(2) From the totality of the evidence it was clear that the appellant was carrying the cannabis for the purpose of trafficking as defined under s 2 of the DDA. With the ingredient of trafficking established by affirmative evidence there was no necessity for the court to invoke the statutory presumption under s 37(da) of the DDA as suggested by the appellant, especially since such a course of action would inevitably militate against the double presumption rule (see paras 17–18).

(3) From the precedents, be it for establishing the ingredient of knowledge, trafficking, or for that matter any ingredient of a charge, the allusion to inferences from the set of facts and proven circumstances was actually a settled matter. Thus, the trial judge was never in error when alluding to inferences to establish the ingredient of trafficking (see para 22).

(4) Even if the trial judge had erred by seriously misdirecting himself, be it on the issue of inference or failing to invoke s 37(da) of the DDA, there was no miscarriage of justice occasioned in this case (see para 23).

(5) After testing the totality of the evidence adduced by the appellant with that of the prosecution it was found that the prosecution had established its case beyond reasonable doubt (see para 26).

[Bahasa Malaysia summary

Bertindak berdasarkan maklumat yang diterima, sepasukan polis yang diketuai Ketua Inspektor Fadzir bin Othman ('KP') telah menjalankan pemerhatian ke atas sebuah restoran yang terletak di Shah Alam. Ketika pengawasan tersebut, KP mengesan Ismail Darmasyah ('perayu') berjalan di hadapannya membawa beg kertas berwarna biru ('beg tersebut') di tangan kanannya. Perayu ditahan oleh ahli pasukan polis yang mengikutinya, di kawasan tempat letak kereta di hadapan restoran. Selepas itu, satu pergelutan berlaku tetapi akhirnya perayu ditahan. Apabila beg yang dibawa oleh perayu diperiksa, ia didapati mengandungi dua papak bahan mampat tumbuhan yang kemudiannya disahkan oleh pakar kimia sebagai 1,7236g kanabis. Perayu dituduh dengan pengedaran 1,7236g kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pihak pendakwaan bergantung ke atas anggapan di bawah s 37(d) ADB untuk membuktikan unsur yang perlu bagi milikan dengan pengetahuan. Hakim bicara mendapati bahawa pihak pendakwaan telah berjaya membuktikan bahawa perayu mempunyai jagaan atau kawalan ke atas beg yang mana mengandungi dadah tersebut dan memutuskan bahawa perayu sedang mengedar kanabis pada masa yang relevan tersebut. Hakim bicara kemudiannya menyabit perayu bagi pengedaran dan menjatuhkan hukuman mati. Ini adalah rayuan perayu terhadap sabitan dan hukuman. Dalam alasan rayuannya, perayu menghujahkan bahawa hakim bicara telah salah arah

dengan membuat dapatan bahawa perayu telah mengedar berdasarkan anggapan milikan dan dengan itu membuat inferens bahawa dia telah mengedar. Adalah menjadi hujahan perayu bahawa memandangkan tiada bukti pengedaran sebenarnya melalui keterangan langsung dan keterangan ikut keadaan yang dikemukakan oleh pihak pendakwaan, hakim bicara sepatutnya membangkitkan s 37(da) ADB untuk mewujudkan unsur pengedaran. Isu utama yang harus dipertimbangkan dalam rayuan ini adalah sama ada hakim bicara telah terkhilaf dengan merujuk kepada inferens untuk membuktikan unsur pengedaran dan bukan merujuk kepada peruntukan anggapan.

Diputuskan, menolak rayuan:

(1) Hakim bicara pada asalnya telah membangkitkan s 37(d) ADB untuk mewujudkan mens rea dadah, beliau disekat daripada membangkitkan apa-apa anggapan lain, beliau hanya mempunyai pilihan secara langsung untuk membuktikan unsur pengedaran (lihat perenggan 12).

(2) Daripada keseluruhan keterangan, adalah jelas bahawa perayu membawa kanabis untuk tujuan pengedaran seperti yang dinyatakan di bawah s 2 ADB. Dengan pembuktian unsur pengedaran oleh keterangan bersetuju, tiada keperluan untuk mahkamah membangkitkan anggapan statutori di bawah s 37(da) ADB seperti yang dicadangkan oleh perayu, khasnya memandangkan kausa tindakan akan melemahkan kaedah anggapan berganda (lihat perenggan 17–18).

(3) Daripada duluan, sama ada untuk membuktikan unsur pengetahuan, pengedaran atau mana-mana unsur pertuduhan, inferens daripada set fakta dan keadaan dibuktikan yang sebenarnya hal yang sudah selesai. Dengan itu, hakim bicara tidak terkhilaf apabila merujuk kepada inferens untuk membuktikan unsur pengedaran (lihat perenggan 22).

(4) Jika pun hakim bicara telah terkhilaf dengan salah arah, sama ada mengenai isu inferens atau kegagalan membangkitkan s 37(da) ADB, tiada ketidakadilan yang berlaku dalam kes ini (lihat perenggan 23).

(5) Selepas ujian keseluruhan keterangan yang dikemukakan oleh perayu dengan pihak pendakwaan, didapati bahawa pihak pendakwaan telah membuktikan kesnya mengatasi keraguan munasabah (lihat perenggan 26).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)

A *Chow Kok Keong v PP* [1998] 2 MLJ 337, FC (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
B *Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] 1 MLJ 64 (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Tan Tatt Eek [2005] 4 CLJ 460, FC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
C *Surentheran a/l Selvaraja v PP* [2006] 1 MLJ 641; [2005] 2 CLJ 264, CA (refd)
Teh Geok Hock v PP [1989] 3 MLJ 162; [1989] 2 CLJ 977, SC (refd)
Tunde Apatira & Ors v PP [2001] 1 CLJ 381, FC (refd)

Legislation referred to

D Courts of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 ss 2, 37(d), (da), (da)(vi), 39B(1)(a), (2)

Hisyam Teh Poh Teik (Suzanawati Ismail with him) (Hisyam Teh Poh Teik) for the appellant.
E *Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Suriyadi JCA (delivering judgment of the court):

F

[1] The appellant was charged at the High Court for trafficking cannabis weighing 1,726g, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), and punishable under s 39B(2) of the same Act. He committed that offence on 13 September 2005 at about 9pm in front of
G Restoran Dawood at Jalan Murai 6/1F, Shah Alam, in the State of Selangor. The learned judge convicted and sentenced him to death.

[2] The approach alluded to by the learned judge enroute towards the conviction was simple and straightforward. After the prosecution had
H successfully established custody or control of the bag (P9) that contained the impugned drugs by the appellant, the learned judge invoked the deeming provision of s 37(d) of the Act, to establish the required ingredient of possession with knowledge. The learned judge after drawing inferences from the facts and circumstances of the case had concluded that the appellant was trafficking
I cannabis at the relevant time. The appellant then filed an appeal against the conviction and sentence of death, which appeal was heard by us, and whereupon the High Court order was upheld.

[3] The brief facts of this appeal are as follows. On 13 September 2005,

acting on information received, a police party headed by Chief Inspector Fadzir bin Othman ('SP5') from the Narcotics Division of the Selangor Police Contingent Headquarters conducted an observation on Restoran Dawood (the restaurant), at Jalan Murai 6/1F, Seksyen 6, Shah Alam. He went there with 11 other police personnel at about 8.30pm. The police party thereupon positioned themselves at strategic places, with SP5 positioning himself at a burger stall, next to the restaurant. At about 9pm SP5 saw the appellant walking past him, carrying a blue paper bag ie P9 in his right hand. He followed the appellant and gave a signal to three of his men to follow him closely from the rear. The appellant walked into the parking area in front of the restaurant and there was detained by the police personnel who had trailed him. A struggle ensued but he was finally subdued and restrained. SP5 who was ten feet away from the scene, walked towards the appellant and seized P9, dropped by him during the struggle. SP5 examined the contents of P9 and found in it a red plastic bag containing two slabs of compressed plant material suspected to be cannabis. He then conducted a body search on the appellant and seized one UNHCR identity card bearing his name. The appellant was then arrested and brought to the police station together with the exhs. The government chemist ('PW2') confirmed that the two compressed slabs found inside P9 contained 1,726g of cannabis as defined under s 2 of the Act. With those facts in hand the appellant was subsequently charged with trafficking of the offending drugs under the abovementioned s 39B(1)(a) of the Act.

[4] As gauged from his written submission the appellant initially canvassed two grounds namely that the learned trial judge misdirected himself when failing to invoke the presumption of trafficking under s 37(da) of the Act (the first ground) and there was doubt as to the identity of the drugs (the second ground). Before us learned counsel for the appellant made a drastic change to the first ground and replaced it with an amended version in that the learned judge misdirected himself in coming to a finding that the appellant was trafficking based on the presumption of possession and thereafter arriving at an *inference* that he was trafficking (the amended first ground). Despite those changes the appellant never outrightly abandon the original first ground. The shift though outwardly appeared to be minor was not so. Learned counsel cleverly submitted that trafficking by inference enroute to establishing the trafficking ingredient was not a recognised evidential concept in law.

[5] The second ground was abandoned by the appellant.

[6] Before discussing whether the establishment of the ingredient of trafficking by inference is a recognised evidential mode some explanation is required why the learned judge made an affirmative finding of trafficking by inference rather than alluding to a presumption provision (and the legal correctness of it). The learned judge had authored:

> Dalam konteks kes ini saya berpendapat tidak ada inferens yang lain yang semunasabahnya dapat dibuat yang memihak kepada OKT dalam keadaan yang menyelubungi kes di hadapan saya tentang pemilikannya terhadap dadah cannabis semasa dia ditangkap di malam kejadian. Saya putuskan daripada keterangan yang ada di hadapan mahkamah ini, terdapat keterangan pada tahap prima facie yang menjurus kepada cara bagaimana dadah tersebut telah dibawa oleh OKT dan jumlahnya saya dapati telah terbukti secara inferens yang munasabah oleh TPR bahawa OKT ini telah melakukan kegiatan pengedaran dadah pada masa kejadian. Nas dalam Mahkamah Persekutuan *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 adalah terpakai.

[7] To reiterate, the appellant's grouse was that the learned judge should have invoked s 37(da)(vi) of the Act in order to establish the ingredient of trafficking. The reason amongst others, as ventilated was that there was no evidence of actual trafficking by way of direct or circumstantial evidence adduced by the prosecution. Relying on *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241 the appellant submitted that being seen carrying P9 containing the cannabis and walking along Jalan Serendit towards the car park did not automatically make him a drug trafficker.

[8] The appellant further suggested that the prosecution could bring home the charge of trafficking only either by invoking the trafficking presumption under s 37(da) of the Act upon an affirmative finding of possession or invoking the presumed possession under s 37(d) of the Act and thereafter call in aid evidence of trafficking by reason of the trafficking definition provided under s 2 of the Act. Here it was canvassed that the learned judge never called in aid the trafficking definition.

[9] Niceties aside, it was obvious that it was the prosecution who suggested the invocation of the presumption of knowledge under s 37(d) of the Act in order to establish the ingredient of knowledge. The learned judge did not disappoint the learned deputy public prosecutor as he did exactly just that. In crystal clear terms the learned judge, as authored in his grounds of judgment, had said that the prosecution was successful in establishing that the appellant had custody or control of P9, which contained the drugs. Alluding to s 37(d) of the Act therefrom, the learned judge wrote that the appellant was thus presumed to have possession of the drugs and knew the nature of the drugs.

[10] Having alluded to the above statutory deeming provision the learned judge had correctly stated the law when he wrote that, having exhausted the presumption of knowledge he was embargoed from invoking s 37(da) of the Act, to establish the ingredient of trafficking. In *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 at pp 288–289; [1998] 2 CLJ 170 at p 191 the Federal Court opined:

> In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

[11] Arifin Zakaria FCJ (as he then was) in *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193 at pp 203–204; [2006] 2 CLJ 129 at p 145 later clarified:

> It ought to be stated at the outset that the decision in *Muhammed bin Hassan* only prohibits the use of double presumption under s 37(d) and s 37(da) of the Act It is, therefore, open to the prosecution to rely on either of the presumption. In other words, the prosecution may positively prove possession without relying on the presumption under s 37(d) of the Act and go on to rely on the presumption of trafficking under s 37(da) of the Act to support a charge under s 39B of the Act. See *Tunde Apatira & Ors v Public Prosecutor*; *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314; [2005] 1 CLJ 398 (a decision of the Court of Appeal which was confirmed by this court in Federal Court Criminal Appeal No 05–27 of 2004(K). *Conversely, the prosecution mv rely on the presumption under s 37(d) to prove possession and seek to prove by affirmative evidence (independent of presumption under s 37(da)) that the accused was in fact trafficking in the dangerous drug.* (Emphasis added.)

[12] With the learned judge having earlier invoked s 37(d) of the Act to establish mens rea of the drugs and embargoed from invoking any other presumption, the learned judge therefore had only the direct evidence option to establish the ingredient of trafficking. And this was exactly what the learned judge did, an act which was in consonant with the current legal thinking.

[13] Before deciding whether his mode of arriving at an affirmative trafficking, as opposed to presumptive trafficking is legally acceptable or not ie before the defence was called, a need arises for us to sift through the evidence and decide whether the ingredient of possession was indeed successfully established. At the risk of being repetitive, the evidence adduced showed that SP5 saw the appellant walking, with P9 in his right hand, from Jalan Serindit

heading towards the parking area in front of the restaurant. Having sifted the evidence the learned judge made a finding of fact that sufficient evidence had been adduced to prove that the appellant had custody and control of P9. We failed to find any error in this factual finding of custody or control of P9.

[14] The learned judge could have taken the easy way out by making a factual finding that the appellant's subsequent attempt to struggle and dropping of P9 on the ground, pointed to knowledge of the contents, but to his credit refrained (*Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717). To be fair to the learned judge, this factor of conduct was indeed considered by him, as he cited the principle discussed in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 when he opined that the appellant's conduct could equally be the reaction of an innocent but surprised person. As at this stage suffice to say that the learned judge rightly decided, as supported by the evidence of SP5 and buttressed by the police report (P18), to be followed by the invocation of s 37(d) of the Act, there was sufficient evidence to establish the ingredient of possession.

[15] We now touch on the factual finding of the learned judge when he concluded that the appellant was in fact trafficking the impugned drugs when arrested carrying the 1,726g of cannabis. In *Abdul Manaf bin Muhamad Hassan* at p 145 the Federal Court had admitted that the definition of trafficking under the Act included the term 'carrying' (see also *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162; [1989] 2 CLJ 977). To resolve this issue the Federal Court had zeroed in on s 2 of the Act in light of the set of facts showing that the respondent was 'in fact carrying' the said drugs. This provision, which clearly includes *carrying* as part of the definition, reads:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, *carrying*, sending, delivering, procuring, supplying, or distributing any dangerous drug otherwise than under the authority of this Act or the regulations under the Act; (Emphasis added.)

[16] It can never be overly emphasised that the mere act of carrying the drugs per se is not sufficient to constitute the offence of trafficking, as discussed in *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64. Further, the fact that the appellant was carrying the drugs from one point to another did not make him an automatic trafficker. Whether he was a trafficker in such a circumstance depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

[17] It was a fact that the two compressed slabs of cannabis were wrapped in a transparent plastic tape and carried by the appellant inside P9 in his right hand. The compressed slabs of cannabis were seized from him after he dropped P9 on the ground in his bid to resist the arrest. Observing the manner how the drug was being handled ie wrapped in two transparent plastic packages and hidden in P9, what with the total amount of drugs involved being large, the reasonable inference that could be drawn was that the appellant was in fact carrying it for the purpose of trafficking. By no stretch of the imagination could that large quantity of cannabis seized from him, which exceeded the minimum statutory presumptive limit carried around at Jalan Murni, was for his own consumption. Having said that we were fully aware that a defence of self-consumption might be available even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s 37(da) of the Act, though the success of that defence will depend very much on several factors (*Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337). Unfortunately here there was no reasonable explanation supplied as to why he carried such a large quantity of the cannabis or even suggested that it was for his own consumption. At best he testified that P9 belonged to one 'Rom' but failed to support the allegation by any evidence, resulting in our considered view that this named person was an afterthought and a fabrication. From the totality of the evidence we were satisfied that he was carrying the said cannabis for the purpose of trafficking as defined under s 2 of the Act.

[18] With the ingredient of trafficking capable of being established by affirmative evidence, and indeed was established, there was absolutely no necessity now for the court to invoke the statutory presumption under s 37(da) of the Act as suggested by the appellant, a course of action that would inevitably militate against the double presumption rule. It was based on the above facts that the defence was called, and without any reasonable explanation to the charge when the defence was called, the learned judge had no other alternative but to find him guilty.

WAS ANY ERROR COMMITTED BY THE LEARNED JUDGE WHEN HE ALLUDED TO INFERENCES IN ORDER TO ARRIVE AT A FINDING OF TRAFFICKING?

[19] In drugs cases the beaten path often used by a deputy public prosecutor to establish the ingredient of knowledge is either by the invocation of s 37(d) of

the Act or made pursuant to conclusions from the set of facts adduced in court. The law as it stands mandatorily requires the prosecution to prove that the accused person knows of his possession and knows the nature of the offending item possessed. To successfully establish that state of mind by direct evidence is a near impossible task hence the need by the prosecution to resort to a deeming provision, or allusion to inferences to prove knowledge or to put it in a more colloquial term, 'he must have known it' (*Chan Pean Leon v Public Prosecutor* [1956] MLJ 237). Resort to inferences will be untenable if there are other possible inferences as it is the established principle that the inference most favourable to the accused person must be drawn in his favour.

[20] But is this concept of establishing the ingredient of trafficking by inference as challenged by the appellant approved by courts? To resolve this question we need to refer to certain cases which have had a brief brush with it. We begin with *Surentheran a/l Selvaraja v Public Prosecutor* [2006] 1 MLJ 641; [2005] 2 CLJ 264, where Abdul Aziz JCA opined, though pertaining to the issue of knowledge, that in almost every case proof of knowledge has to be by way of inference from the proven circumstances-and one set of circumstances differs from another, and in any given case whether knowledge is inferable depends on the particular circumstances of the case and proper appreciation of them. *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* more on point when alluding to the approach by inference said:

> Judging from the manner the drug was being carried ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may be drawn is that the respondent was in fact carrying it for the purpose of trafficking. (Emphasis added.)

[21] At the end of the appeal, based on the above finding of facts, the order of the Court of Appeal was set aside and the conviction and sentence order imposed by the High Court was reinstated and affirmed by the Federal Court. Nik Hashim FCJ in *Public Prosecutor v Tan Tatt Eek* [2005] 4 CLJ 460 at p 466, had also occasion to discuss this issue when he said:

> Thus what is required is that in order for the prosecution to ask the court to draw any inference, it must provide the court with clear evidence of a set of facts which leave no other possible alternative inference which can reasonably be drawn …

[22] From the samples of the above precedents, be it for establishing the ingredient of knowledge, trafficking, or for that matter any ingredient of a

charge, the allusion to inferences from the set of facts and proven circumstances is actually a settled matter. That being so with this mode a recognised evidential approach the learned judge therefore was never in error when alluding to it.

[23] On the improbable possibility that the learned judge had erred here by seriously misdirecting himself, be it on the issue of inference or failing to invoke s 37(da) of the Act (which would have contravened the rule against double presumption in the circumstances of the case), we found no miscarriage of justice having been occasioned. Nothing was found in the notes of evidence or ground of judgment to indicate that such miscarriage of injustice had taken place. The admissible evidence adduced was too overwhelming not to support the order of the learned judge (s 60(1) of the Courts of Judicature Act). Alluding again to the above case of *Public Prosecutor v Abdul Manaf bin Muhamad Hassan*, Arifin Zakaria FCJ relying on *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 CLJ 381, had occasion to remark:

> ... as a general rule, the appellate court will in the normal course of event, quash a conviction where there has been misdirection. Exceptionally, it said, a conviction will be upheld despite a misdirection where the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. In other words, the court would still uphold the conviction despite the misdirection where no miscarriage of justice has been detected.

[24] In *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151, the Supreme Court opined:

> ... even though the trial judge in that case had applied the wrong test when calling for the defence, the error was of no consequence and did not vitiate the conviction, because even if he had applied the more stringent test, the result would have be the same having regard to overwhelming nature of the case for the prosecution …

[25] To summarise this sub issue, as a general rule this court will normally quash a conviction where there has been misdirection but not in certain exceptional circumstances despite that misdirection. If we are satisfied that a reasonable tribunal will convict the accused on the available evidence on a proper direction the conviction will be upheld. On the other hand if a miscarriage of justice has taken place such conviction will not be sustained.

[26] Returning to the mainstream, with the ingredient of possession left unrebutted on a balance of probability, or the affirmative trafficking not rebutted at the stage of the defence, the decision of the High Court was certainly unimpeachable. After testing the totality of the evidence adduced by the appellant with that of the prosecution we were satisfied that the prosecution

had established its case beyond reasonable doubt. On that premise we had no other alternative but to dismiss the appeal and affirm the order of the High Court.

Appeal dismissed.

Reported by Kohila Nesan